



AGC
THE CONSTRUCTION
ASSOCIATION

**Fisher
Phillips**

Strategies To Improve Workplace Vaccination Rates and Preparing For Various Mandates

August 26, 2021

D. Albert Brannen

Partner, Fisher & Phillips LLP | Atlanta
dabrannen@fisherphillips.com
Cell: 404-441-9992 | Office: 404-240-4235

Patrick Dennison

Partner, Fisher & Phillips LLP | Pittsburgh
pdennison@fisherphillips.com
Cell: 412-580-1575 | Office: 412-822-6627



Legal Disclaimer

- Information in this presentation or on Fisher Phillips' website is provided as a service.
- Content provided in this presentation or on our website is general information and does not constitute legal advice.

Today's Speakers



D. Albert "Bert" Brannen



Patrick Dennison

Vaccines

- Just when we thought things were moving in the right direction...
- Delta-variant-fueled surge of COVID-19 cases leading to new CDC masking guidance, statewide mandates, and the specter of further restrictions
- Hesitant bloc of workers who still have not received any COVID-19 vaccine doses
- Renewed interest in seeing the vaccination rate climb
- Federal, state and company mandates are in the news
- Options?





Vaccines- Popular Options

- Informational Campaign
- Incentives
- Testing the Unvaccinated
- Additional Safety Protocols
- Vaccine Mandate



FP's Flash Survey Results

- Third FP survey conducted this year.
- Over 700 employers responded each survey
- While only 4% of respondents indicated they would mandate or consider a mandate in the survey completed between May 14-19, that number jumped to 15% in this most recent survey this month.
- The number of employers opposed to a mandate dropped by 15 points during the past three months, but it remains high, at 68%.



FP's Flash Survey Results

- 64% of employers who changed their policy did so because of Delta-variant fueled surges.
- Other prime factors that led employers to feel more comfortable with the idea of vaccine mandates over the past several months include:
 - A quarter of employers (24%) view requiring vaccinations as serving the greater good;
 - 23% now feel the law permits vaccine mandates;
 - 16% believe their workforce is now more receptive to being vaccinated;
 - 13% of employers reported they want to be able to appeal to customers and visitors that their staff has been vaccinated; and
 - 12% want to see more remote workers spend time at the physical workspace.



FP's Flash Survey Results

Industries Most Likely to Mandate

- Healthcare: 42%
- Hospitality: 29%
- Education: 24%
- Non-Profit or Civic Organizations: 22%

Industries Generally in Line with Overall Average

- Professional and Technical Services: 14%
- Technology: 14%
- Retail: 13%
- Construction: 11%

Industries Least Likely to Mandate Vaccine

- Automotive: 9%
- Manufacturing: 8%
- Staffing, PEO, and Employment Services: 7%
- Finance and Insurance: 5%

Options for Increasing Vaccination Rates

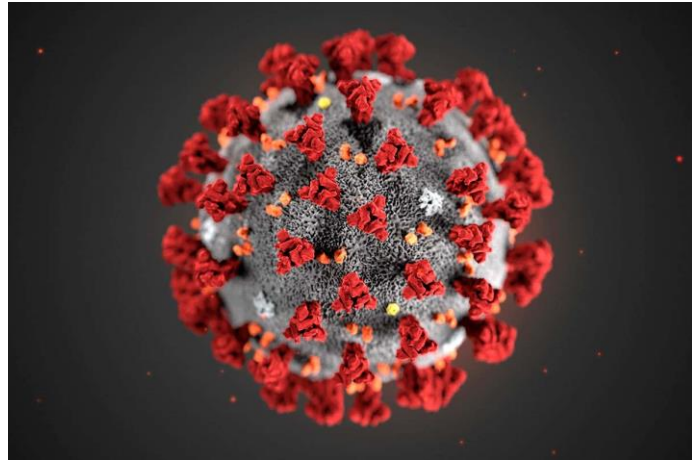
Launch an Informational Campaign
Regulations



Informational Campaign

- People are flooded with disinformation about COVID-19 vaccines from social media, disreputable (and sometimes reputable) news sources, and word of mouth
- Others simply do not have information
- Evaluate whether you can improve vaccination rates by providing targeted informational opportunities for your workers
- Address specific questions, concerns, or misconceptions among vaccination skeptics in your workforce

Informational Campaign



- Have HR or other company leaders present informal question-and-answer sessions
- Invite respected medical or public health representatives to provide in-person or virtual education with the opportunity for Q&A
- Share informational videos from the CDC or other trusted resources about the vaccines
- Conduct a group gathering or town hall to discuss FAQs



Informational Campaign Tips

- Provide materials that can be considered outside of the workplace, discussed with family members
- Encourage employees to consult their medical provider
- Use language that is appropriate for your employees
- Pay employees for time spent at any of the information sessions

Options for Increasing Vaccination Rates



Incentives





Incentives– Where Are We?

- January 7, 2021 proposed rules were subsequently withdrawn.
- EEOC Guidance on May 28, 2021 described two options for employers:
 - If your organization (or an “agent” acting on your organization’s behalf) administers the vaccine, you can still offer incentives – but they cannot be so substantial in value as to be considered coercive.
 - If your employees voluntarily provide documentation confirming they have been vaccinated and got the shot on their own from a pharmacy, public health department, or other health care provider, you can offer incentives with no definitive limitations (but watch out for the ADA Wellness Rule and other considerations).

Incentives– Avoiding the Agent Designation?

- The EEOC guidance defines “agent” as being an individual or entity having the authority to act on behalf of, or at the direction of, the employer (which could include an onsite nurse, onsite medical staff, and perhaps beyond).
- Do everything you can to keep a wall between you and the healthcare provider offering the vaccines – especially if you are setting up a vaccine clinic at your worksite to make it easier for workers to get inoculated.



Incentives– ADA Wellness Rule

Complications with ADA Wellness Rules may arise if:

- Program is not “voluntary,” in view of applicable history, guidance, and court decisions.
- If the incentive offered is too high.
- EEOC: employees could feel coerced to participate, leading to wellness program rules violations when employees are “forced” to disclose protected medical information in order to gain the incentive.
- EEOC’s proposed rule permitted only *de minimis* incentives.
- Biden administration withdrew proposed rule during administrative transition.
- **Takeaway: Despite recent EEOC guidance, higher incentives may mean higher risk because of a higher likelihood that they could be viewed as coercive.**

Incentives– Accommodation Considerations

- Employers must also consider offering alternative means for an employee to earn an incentive if unable to be vaccinated due to a medical/disability or religious objection.
- Some potential options:
 - Watching a workplace COVID-19 safety video.
 - Reviewing CDC literature on how to mitigate the spread of COVID-19 in the workforce.
 - COVID-19 testing.

Incentives– Confidentiality Considerations



- All documents and information about an employee's vaccination status should be maintained confidentially.
- You may not offer incentives to your employees in return for their family members getting vaccinated.
- You can still offer an employee's family member the opportunity to be vaccinated by your organization or your agent if you take certain steps to ensure compliance with federal privacy laws.



Incentives– Options

- *Cash*
- *Gift cards*
- *Paid time off*
- *Raffles*
- *Vacations*
- *Fitness Equipment*
- *More...*

Options for Increasing Vaccination Rates

Regularly Testing the Unvaccinated
Regulations



Testing

- President Biden and a growing number of municipalities are implementing policies requiring all non-vaccinated personnel to be subject to regular COVID-19 testing.
- Employers may also choose to voluntarily implement a vaccine and testing policy.



Testing

- Collect information from your workers about whether they are vaccinated or not, to determine who must be tested.
- Comply with all laws to securely store the information collected from your employees, whether electronically or in a hard copy file (or both). Be mindful of the ADA.
- Determine how often you will test employees who do not provide proof that they have been vaccinated.
- Require frequent-enough testing that the system reasonably catches potential outbreaks of COVID-19, but not so frequent that your testing requirement appears to be punitive in nature.



Testing

- Written policy.
- Testing protocols must comply with applicable wage and hour laws and expense reimbursement requirements.
- Time spent receiving employer-required tests should be treated as compensable time.
- Determine how you will handle a positive COVID-19 test.
- Have quarantine and return-to-work protocols in place along with clear contact tracing guidelines (which will vary depending on the vaccination status of those who came in close contact with anyone testing positive).



Vaccine and Testing- Accommodation Considerations

- Uptick in requests for accommodation for exemption from both vaccinations and testing.
- Medical, disability and/or religious exemption requests.
- Written policy should include an accommodation request procedure.
- Internal process on addressing these requests.
- What are an employer's obligations when faced with a request to be exempt from both vaccinations and testing?
 - Particular considerations when the vaccine and testing policy is through a government mandate.

Vaccine and Testing- Policy

- Communicate new policies with workforce in a clear and direct manner. (Written communication preferred.)
- Virtual or in-person meetings where the rationale can be communicated and workers can ask questions.
- Emphasis should be on maintaining a safe workplace.

Options for Increasing Vaccination Rates



Additional Safety
Restrictions for the
Un-Vaccinated



Additional Safety Protocols

- You can require those who do not provide proof of vaccination to comply with additional safety restrictions as necessary to maintain a safe workplace.
 - Renewed masking requirements (if not already mandated regardless of vaccination status),
 - Restrictions on business-related travel, and
 - Other concepts relevant to your work environment.
- Be mindful that the protocols should not be punitive.
- *Workers who are unvaccinated or decline to provide their status and are required to follow additional safety protocols may claim retaliation if they feel harassed or discriminated against.*

Options for Increasing Vaccination Rates



Mandate the Vaccine



Vaccine Mandates



- EEOC/ State Guidance
- Reasonable Accommodation Considerations
- Additional Issues

Vaccine Mandates-

EEOC COVID-19 Vaccine Guidance

- First issued on December 16, 2020; updated May 28, 2021.
- Employers *can* **require** workers to get COVID-19 vaccine.
 - **EUA** status did not appear to negate this.
 - Consider employee's duties and work setting.
- When may an employee be "*excluded from the workplace*" for not being vaccinated?
 - **Direct Threat** – would an unvaccinated worker pose significant risk of substantial harm, based on reasonable medical judgment, which cannot be eliminated by a workplace accommodation? This is a high standard.
 - **Qualification Standard**



Vaccine Mandates- Safety Qualifications Standard

- Not as difficult to meet as “direct threat” standard.
 - Direct threat requires establishing that threat cannot be eliminated by a reasonable accommodation.
- Must be an objective basis for the standard, historically tied to jobs protecting public safety. Standard must be job-related and consistent with business necessity.
- Be prepared to support imposition of that standard on a job.



Vaccine Mandates- Risky Business?

- Some workers may have legitimate medical or religious reasons for not taking the vaccine, *requiring* you to evaluate their accommodation requests on an interactive, individualized basis.



Vaccine Mandates- Accommodation Considerations

- An employee ***may*** be entitled to exemption from “required” vaccines:
 - due to an ADA-covered disability or other medical circumstances
 - based on sincerely-held religious beliefs, practices, or observances
- In either case – “interactive process” is critical
- Employer must consider reasonable accommodations
- Document communications with employee
- Employer’s rights to make medical inquiries are limited
- “Process” may be as important as the final accommodation decision
- Supervisor training is vital – avoid inadvertent medical inquiries

Vaccine Mandates- Risky Business?

- If you mandate the vaccine, some employees may file suit on bases other than ADA or Title VII, such as challenging the policy based on vaccines EUA status; claiming violations of rights to self-expression or political activity; alleged whistleblower or retaliation claims...
- In unionized setting, mandates are likely a mandatory subject of bargaining.



Other Considerations



Other Vaccine Considerations – Tracking and Privacy



- If you do not mandate the vaccine, should you inquire about and track the vaccine status of your workers to determine whether someone is fully vaccinated?
- Will this raise privacy and disability discrimination concerns?



Vaccine Considerations- Proof of Vaccination Status

Should employers ask for “proof” of vaccination status?

- If allowed, yes.
 - OSHA
 - State Agencies (e.g., Cal/OSHA): The revised Cal-OSHA ETS defines “fully vaccinated” as the employer has **documentation** showing the person received, at least 14 days prior, either the second dose in a two-dose COVID-19 vaccine series or a single-dose COVID-19 vaccine.
 - Definition of “proof” may vary depending on the jurisdiction, industry, etc.

Vaccine Considerations- Proof of Vaccination



- In most jurisdictions, employers may inquire about vaccination status.
- EEOC has stated that seeking proof of vaccination is not a medical examination.
- Employers should instruct employees not to disclose any additional medical or other information and must maintain any information as confidential.
- Covered employers must also provide notice pursuant to the California Consumer Privacy Act (CCPA).



Vaccine Considerations- Decline to Disclose Vaccination Status

What if an employee declines or refuses to disclose their vaccination status?

- Remind employee of legitimate business-related reasons for the inquiry but proceed with caution before disciplining or taking any other adverse action, even if there is a mandatory vaccination policy.
- Even with a mandatory vaccination policy, ensure that you have a process in place to address issues of reasonable accommodation with employees prior to moving to discipline or any adverse action.
- Also consider whether reprimanding an employee for declining to disclose their vaccination status could be viewed as a per se mandatory vaccination policy, which requires an accommodation analysis in the event the employee cannot get the vaccine for disability or religious reasons or if such reprimand is allowable in the particular jurisdiction.
- Employees who refuse to disclose their status should be treated as unvaccinated.



NEXT STEPS/ACTION PLAN



Next Steps/Action Plan

- Establish a procedure for collecting employee's vaccination status and a process for safeguarding that information confidentially.
- Once the information is collected, determine what percentage of employees is vaccinated.
- Evaluate what approach *or combined approaches* may be most successful amongst your employee population and the timeline for implementation.
- Create a clear and detailed **written** policy which includes information on how employees can seek an accommodation and how you will handle such requests.

Visit **FISHER PHILLIPS** **VACCINE RESOURCE CENTER** for **Employers**

Fisher Phillips has a number of resources to aid employers with the upcoming COVID-19 vaccine. We encourage you to check back often.

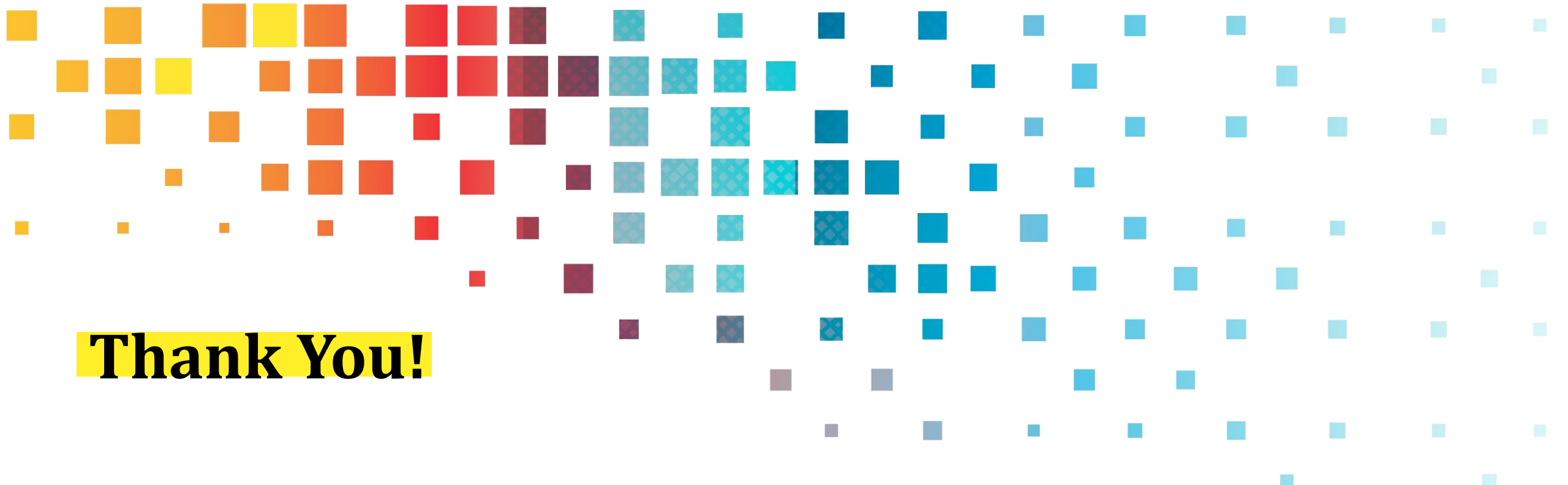
- COVID-19 Vaccine FAQs
- Sample policies and procedures
- Data Bank of templates and forms
- 50-state issues
- COVID-19 Vaccine and Flu insights
- ... and more

Visit **fisherphillips.com** for up-to-date information

A decorative graphic in the top left corner consisting of a grid of squares in various colors including yellow, orange, red, and blue. The squares are arranged in a pattern that tapers off to the right.

Questions?





Thank You!

D. Albert Brannen

Partner, Fisher & Phillips LLP | Atlanta
dabrannen@fisherphillips.com
Cell: 404-441-9992 | Office: 404-240-4235

Patrick Dennison

Partner, Fisher & Phillips LLP | Pittsburgh
pdennison@fisherphillips.com
Cell: 412-580-1575 | Office: 412-822-6627

